

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	

**PETITION FOR RECONSIDERATION OF  
SACRED WIND COMMUNICATIONS, INC.**

Pursuant to Section 1.429 of the Federal Communications Commission’s (“FCC” or “Commission”) rules,<sup>1</sup> Sacred Wind Communications, Inc. (“Sacred Wind”) files this petition for reconsideration of the Report and Order<sup>2</sup> in which the Commission increased the amount of operating costs that some carriers that predominantly serve Tribal lands can recover from the Universal Service Fund (“USF”) in recognition that they are likely to have higher costs than carriers not serving Tribal lands.

**I. BACKGROUND.**

Sacred Wind is a privately owned, New Mexico-based corporation formed in 2004 to introduce basic telephone and broadband services to thousands of unserved homes on Navajo Reservation and near-Reservation lands. Sacred Wind is the only non-tribal incumbent local exchange carrier (“ILEC”) formed exclusively to serve tribal customers. Sacred Wind serves a population of approximately 23,300 people, 98 percent of whom are Navajo citizens. The service territory’s average population density is approximately 7.3 people per square mile, one of the most sparsely populated areas in the country. Additionally, the customers that Sacred Wind serves are generally low-income and reside in extremely rural, remote areas.

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<sup>1</sup> 47 C.F.R. § 1.429.

<sup>2</sup> *Connect America Fund*, [Report and Order](#), WC Docket No. 10-90, FCC 18-37 (rel. Apr. 5, 2018) (“*Tribal Opex Order*”).

When Sacred Wind commenced operations, voice penetration was less than 30%, and there was no broadband service. Today, voice and broadband service is available to 85% of its customer base, with broadband at download speeds of 4 Mbps, 6 Mbps, 10 Mbps, 15 Mbps and 20 Mbps. Sacred Wind provides voice and broadband access to over 7,000 homes in an area nearly twice the size of the State of Delaware. Widely scattered homes separated by five mountain chains and difficult desert terrain contribute to the challenges of serving subscribers dispersed over such a vast area. These challenges, exacerbated by the low-income subscriber base, mean that Sacred Wind relies upon the Commission's Universal Service Fund ("USF") programs to recover its network operating expenses.<sup>3</sup>

**II. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO LIMIT RELIEF TO CARRIERS THAT HAVE NOT DEPLOYED BROADBAND SERVICE TO 90 PERCENT OR MORE OF HOUSING UNITS IN THEIR STUDY AREA.**

In March 2016, the Commission adopted the *Rate of Return Reform R&O and NPRM* establishing a new mechanism for the distribution of Connect America Fund support in rate-of-return areas.<sup>4</sup> As part of these reforms, the Commission adopted a limitation on the amount of operating expenses ("opex") for which rate-of-return carriers may receive high-cost support.<sup>5</sup> The Commission set a limit on operating expense costs calculated by comparing each study area's opex cost per location to the regression model-generated opex per location plus 1.5

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<sup>3</sup> For additional background on Sacred Wind, please refer to its recently-filed comments in this docket. *See Connect America Fund*, et. al., [Comments of Sacred Wind Communications, Inc.](#), WC Docket No. 10-90, et. al. (filed May 25, 2018).

<sup>4</sup> *Connect America Fund*, et. al., [Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking](#), WC Docket No. 10-90, et. al., FCC 16-33, at ¶¶ 95-104 (rel. Mar. 30, 2016) (*Rate of Return Reform R&O and FNPRM*).

<sup>5</sup> *Rate-of-Return Reform R&O* at ¶¶ 95-104.

standard deviations.<sup>6</sup> In that item, the Commission asked whether the opex limitations should be modified for carriers serving Tribal lands.<sup>7</sup>

In the *Tribal Opex Relief Order*, the Commission raised the opex limitation to 2.5 standard deviations above the regression-determined amount for those carriers serving Tribal lands that meet certain conditions.<sup>8</sup> Specifically, the Commission limited the availability of this relief to those carriers meeting the following conditions: (1) the carrier has not deployed broadband service of 10 Mbps download/1 Mbps upload to 90 percent or more of the housing units on the Tribal lands in its study area; and (2) unsubsidized competitors have not deployed broadband service of 10/1 Mbps to 85 percent or more of the housing units in the study area.<sup>9</sup>

**a. The Commission Did Not Provide Notice Regarding the Adopted Relief Limitations.**

Even though the Commission recognizes “there are unique costs associated with serving Tribal lands,”<sup>10</sup> the Commission added these relief limitations without notice, opportunity for comment, or the other processes normally associated with a decision such as this. Further, the Commission cites no record support for the 90 percent condition and offers no explanation as to why such a condition is necessary to “limit this relief to those carriers with the greatest need to accelerate broadband deployment.”<sup>11</sup>

While federal agencies are free to adopt rules that are not identical to those described in a notice of proposed rulemaking where any differences are sufficiently minor and could have been anticipated by interested parties,<sup>12</sup> in order to comply with its notice obligations under the

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<sup>6</sup> *Rate-of-Return Reform R&O* at ¶ 99.

<sup>7</sup> *Rate-of-Return Reform FNPRM* at ¶ 382.

<sup>8</sup> *Tribal Opex Order* at ¶ 6.

<sup>9</sup> *Id.* at ¶ 7.

<sup>10</sup> *Id.* at ¶ 5.

<sup>11</sup> *Id.* at ¶ 7.

<sup>12</sup> *Nat’l Cable Television Assn., Inc. v. FCC*, 747 F. 2d 1503, 1507 (D.C. Cir. 1984).

Administrative Procedures Act, an agency must alert interested parties “to the possibility of the agency’s adopting a rule different than the one proposed.”<sup>13</sup> The adequacy of the notice, then, depends on whether the final rule is a “logical outgrowth” of the proposed rule.<sup>14</sup>

The *Rate of Return Reform Order* sought comment regarding “whether carriers that serve Tribal lands, in whole or in part, should not be subject to the measures to limit operating expenses and the overall budget control mechanism adopted” in the item.<sup>15</sup> The Commission further asked if it were to “exempt such providers from those opex...limitations, how should [it] determine the providers subject to such limitations? For instance to be eligible for such an exemption, should 50 percent or more of the carrier’s study area be Tribal lands? What would the budgetary impact be on other rate-of-return carriers that remain on legacy support mechanisms if [it] were to adopt such exemptions?”<sup>16</sup> At no point did the Commission suggest that the condition for such relief would be tied to criteria related to a carrier’s deployment of broadband services in its study area, the extent of such deployment, speed availability, competitive alternatives, or any analogous criteria that would have provided notice to carriers and an opportunity to comment. Instead, the only question on eligibility focused on the extent to which a carrier’s study area included Tribal lands. Such a limitation on Tribal opex relief adopted by the Commission based on criteria tied to a carrier’s and competitors’ broadband deployment in the carrier’s study area may not simply be foisted on carriers in the absence of

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<sup>13</sup> *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994). *See also Sprint v. FCC*, 315 F. 3d 369 (D.C. Cir. 2003) (vacating a rule where the Commission failed to give adequate notice that it was considering a change in reporting requirements that were more burdensome under the new rule).

<sup>14</sup> *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991).

<sup>15</sup> *Rate of Return Reform FNPRM* at ¶ 382.

<sup>16</sup> *Id.*

adequate notice of the Commission's intention to do so and an opportunity to comment.<sup>17</sup>

**b. The Commission's Decision to Limit Relief to Carriers That Have Not Deployed Broadband Service to 90 Percent or More of Housing Units in Their Study Area Does Not Logically Relate to Operating Expense Levels and Creates an Incentive *Not* to Deploy Broadband.**

That the condition tied to broadband deployment does not logically relate to the level of operating expenses incurred in a given area is also cause for concern. Operating expenses are a function of operating and maintaining the network in place, providing customer service, performing billing functions, and engaging in the overall management of the company. Deploying broadband to a significant portion of the locations in Sacred Wind's study area and maintaining service to those locations in a very remote and mountainous area with severe weather conditions, among other factors, increases Sacred Wind's operating expenses. As such, Sacred Wind's need for opex relief is actually *greater* than that of carriers with deployment levels further below 90 percent. A rural telecommunications company's work is not done – and does not become less expensive – simply because the network reaches 90 percent of the housing units in its study area.<sup>18</sup> There is no logical basis to craft a relief limitation around such a premise. Indeed, a rural telecommunications company incurs these expenses at a higher level in Tribal areas, regardless of the percent of 10/1 Mbps service in an area.

Further, the addition of the condition that any carrier with 90% or greater 10/1 Mbps broadband deployment cannot receive the relief provides a perverse incentive *not* to expand

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<sup>17</sup> Other parties to this proceeding agree. See *Connect America Fund*, [Notice of Ex Parte from Mescalero Apache Telecom, Inc.](#), WC Docket No. 10-90 (filed May 22, 2018) (*Mescalero Ex Parte*) (stating “[t]his condition was adopted without sufficient explanation as to why such a condition is necessary to ‘limit this relief to those carriers with the greatest need to accelerate broadband deployment,’ without record support for such a condition, and with no notice that the Commission was contemplating such an action”); see also *Connect America Fund*, et. al., [Comments of the National Tribal Telecommunications Association](#), WC Docket No. 10-90, et. al., at p. 7).

<sup>18</sup> See also *Mescalero Ex Parte* at p. 2 (stating that “the need for relief from the operations expense limitation rule is even greater for [carriers with higher deployment levels]”).

broadband deployment. In effect, the 90 percent condition punishes carriers for doing exactly what the Commission wants them to do – deploy broadband services as widely as possible in unserved and underserved areas. For carriers nearing the 90% threshold, the Commission’s condition could disincentivize further broadband deployment that would cause the carrier to cross the threshold. Sacred Wind does not believe the Commission desires this type of disincentive to be attached to its efforts to increase broadband deployment in Tribal areas.

**III. IF THE COMMISSION RETAINS THE 90 PERCENT DEPLOYMENT CEILING, IT SHOULD RECONSIDER ITS DETERMINATION THAT SACRED WIND IS INELIGIBLE FOR RELIEF.**

Sacred Wind has substantive concerns with the underlying rule and the process used to adopt it. However, if the Commission retains the 90 percent deployment ceiling, it should reconsider its determination that Sacred Wind is ineligible for relief. With little explanation or discussion, the Commission stated that “Bureau staff estimates in 2017 and/or 2018 that five carriers that have been affected by the opex cap are eligible for the relief.”<sup>19</sup> Sacred Wind was not one of the five carriers listed. As shown below, Sacred Wind does not serve 90 percent of the housing units on Tribal lands in its study area with 10/1 Mbps broadband service, using Form 477 data and U.S. Census housing unit data.<sup>20</sup> As such, Sacred Wind should be eligible for the relief from the operations expense limitation rule provided in the *Tribal Opex Order*.

<b>Number of Housing Units on Tribal land in Sacred Wind Study Area</b>	5992
<b>Housing Units on Tribal land Covered with 10/1 Mbps Broadband Service per Sacred Wind Form 477 Filing</b>	5344
<b>Percentage of Covered</b>	89.1%

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<sup>19</sup> *Tribal Opex Order* at ¶ 9, App. D.

<sup>20</sup> United States Census, [Housing Data](#) (last visited May 30, 2017).

<b>Housing Units on Tribal land in Sacred Wind Study Area</b>	
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Though Sacred Wind does not serve 90 percent of the housing units on Tribal lands in its study area with 10/1 Mbps broadband service when calculated using housing unit information from the U.S. Census Bureau, Sacred Wind encourages the Commission to instead use Connect America Fund A-CAM location data per funded census block.<sup>21</sup> The A-CAM model yielded 7,055 total (tribal and nontribal) locations in Sacred Wind’s study area. The housing unit count for the same area, based on 2010 U.S. Census housing data, was 7,161 – a difference of 1.3%. Sacred Wind is concerned that the total number of housing units it serves may fall into this margin of error. In such a case, Sacred Wind requests that the Commission instead use A-CAM location data. This data is more current, reflecting 2018 A-CAM model location numbers and, like the U.S. Census housing data, distinguishes between tribal and non-tribal locations. It is also Sacred Wind’s experience that the ACAM data more accurately reflects the number of locations actually located within the Sacred Wind study area. Using the A-CAM data yields the coverage results illustrated below.

<b>Number of Locations on Tribal land in Sacred Wind Study Area<sup>22</sup></b>	5613
<b>Locations on Tribal land Covered with 10/1 Mbps Broadband Service per Sacred Wind Form 477 Filing</b>	4973
<b>Percentage of Covered Locations on Tribal land in Sacred Wind Study Area</b>	88.6%

<sup>21</sup> Federal Communications Commission, [Connect America Fund A-CAM 2.4.0 Report Version 12.0 and 13.0](#) (May 10, 2018).

<sup>22</sup> United States Census, [Housing Data](#) (last visited May 30, 2017).

#### IV. CONCLUSION

Sacred Wind is dedicated to maintaining and extending its voice and broadband network in order to bring service to the Navajo people, and is appreciative of the Commission and staff's efforts in this proceeding. For the reasons outlined above, Sacred Wind urges the Commission to reconsider its decision to limit opex relief to carriers that have not deployed broadband service to 90 percent or more of housing units on Tribal lands in their study area. Further, if the Commission decides to retain the 90 percent deployment ceiling, Sacred Wind urges it to reconsider its determination that Sacred Wind is ineligible for relief. Sacred Wind looks forward to its continued work with the Chairman, Commissioners, and Commission staff in this proceeding.

Respectfully submitted,

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